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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

MATTANIAH EYTAN, Plaintiff, Cross-defendant and Appellant, v. JONATHAN WAN, Defendant, Cross-complainant and Appellant.	A089978; A091120 (City and County of San Francisco Super. Ct. Nos. 964852, 973008)

We consider two consolidated appeals in this opinion. In A089978, Jonathan Wan appeals from a judgment entered after a court trial, in which the court awarded attorney Mattaniah Eytan damages of $40,000, plus prejudgment interest, for breach of contract. In A091120, Eytan appeals from an order denying his motion for attorney fees under Civil Code section 1717. We affirm both the judgment and the order.

SUMMARY OF THE FACTS

A detailed account of all the evidence is unnecessary. Instead, we summarize the facts relevant to the issues raised in the appeals, keeping in mind the controlling standard of review regarding any conflicts in the evidence. We must view the evidence in the light most favorable to the judgment, presume every fact the trier of fact could reasonably have deduced from the evidence, and defer to the trier of fact's determination of the weight and credibility of the evidence. (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 60.)

Wan owned at least 70 percent of the stock of Bit Software, Inc., a small software company (hereafter BIT). He was BIT's founder, president, and chairman of the board. Beginning in late 1989 or early 1990, Eytan or one of the attorneys he employed performed legal work for BIT on several occasions and also represented Wan personally in at least two matters. Eytan billed monthly for his services. In 1992, a dispute arose between Wan and Eytan over an unpaid bill, and their relationship deteriorated.

Nevertheless, sometime in late 1993, Wan asked Eytan to represent BIT in two matters: (1) a lawsuit filed against BIT by Peter Hertan, a broker who claimed that he was entitled to a commission on sales of BIT software to IBM; and (2) the sale by BIT of its assets to Cheyenne Corporation (Cheyenne), at the time a rapidly growing high-tech company listed on the American Stock Exchange.

Eytan was reluctant to resume his representation of BIT because of the unresolved fee dispute. He was aware that under the terms of the Cheyenne transaction, at closing BIT would receive Cheyenne shares that would immediately be passed on to BIT's shareholders, leaving BIT itself with no assets. As a majority shareholder in BIT, however, Wan was likely to receive Cheyenne shares worth "a couple million dollars." Eytan wanted assurance that he would be paid by someone with assets. Therefore before agreeing to represent BIT in these matters, Eytan asked Wan to personally guarantee any fees incurred by BIT.

Eytan resumed his representation of BIT after Wan signed a letter agreement dated December 1, 1993, promising to pay $11,000 to settle past due bills of $14,000, to pay a $3,500 retainer for the Hertan litigation, and to personally guarantee payment of all amounts incurred either by BIT or by Wan himself through March 1, 1994, the anticipated date of the closing of the Cheyenne transaction. When the closing was delayed, Wan agreed to extend his personal guarantee to cover all work by Eytan's law firm through the closing. On more than one occasion Wan assured Eytan or his associate that Eytan would be paid at the closing.

Eytan sent monthly bills indicating that as of the end of April 1994, BIT owed $108,000. The closing was rescheduled for May 19, 1994. Shortly before that date,

either Wan or his accountants asked Eytan for an up-to-date statement that would include fees incurred through the closing, and Eytan provided an estimate of $136,000.

Michael Webber, an associate in Eytan's law firm, went to New York for the closing. Webber overheard a conversation leading him to be concerned about whether the fees would be paid at the closing as promised. On May 19, 1994, after discussing the situation with Eytan, Webber obtained Wan's personal guarantee to pay the $136,000 in full, with a $50,000 "deferment" for 30 to 60 days, and to pay future legal fees incurred by JWanCo.[1] According to Webber, he did not threaten or coerce Wan in any way to execute the guarantee and did not say that he would not release an opinion letter critical to the Cheyenne transaction unless Wan signed the guarantee. Eytan never instructed Webber not to release the letter unless he obtained money from Wan.

Eytan was paid $86,000 from the proceeds at the closing. Eytan continued to do some work for BIT, and in June 1994, BIT paid Eytan an additional $30,000. That month, Eytan refused to represent JWanCo or Wan in a shareholder's suit against Cheyenne. In July 1994, Wan as president of JWanCo informed Eytan by letter that they had retained another law firm to handle their "claims and settlement for damages" in the Cheyenne and BIT Software acquisition, but asked Eytan to "handle the on going legal matters relating to closing matters, agreements, third party claims, pending litigations and settlements."

According to Eytan, as of September 16, 1994, Wan and his companies owed Eytan $61,205.44. Eytan wrote to Wan proposing to settle the fee matters for $40,000. On October 5, 1994, Wan signed the settlement agreement. On October 20, Wan informed Eytan by letter that after consulting with his current attorney, he was rescinding the settlement on behalf of himself and JWanCo. On October 31, Eytan filed his complaint against Wan.

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1 After the sale of its assets to Cheyenne, BIT was renamed JWanCo.

PROCEDURAL HISTORY AND THE COURT'S FINDINGS

Eytan's complaint included causes of action for breach of contract and declaratory relief. The first cause of action in Eytan's complaint alleged breach of the agreement executed on May 19, 1994 (the May guarantee), under which Wan agreed to personally guarantee payment to Eytan of fees for legal services to JWanCo and its predecessor, BIT. Eytan's second cause of action sought a declaration of the parties' rights under the October 5, 1994, settlement agreement (the October settlement), under which they agreed to settle all of Eytan's claims against Wan for payment of $40,000. (Super. Ct. S.F. City and County, 1994, No. 964852.)

Wan filed a cross-complaint, alleging legal malpractice, breach of fiduciary duty, and negligent misrepresentation, and seeking rescission of any guarantee agreements and damages.[2] Eytan filed a cross-complaint to the cross-complaint, seeking damages from Wan and JWanCo for breach of an oral contract to pay for legal services, and other relief. Although Eytan's initial complaint included a request for attorney fees, his cross-complaint, as amended, did not.

Wan requested a jury trial, but before trial, both parties waived a jury. They also agreed to bifurcate the proceedings, with the enforceability of the October settlement to be tried first. At the conclusion of the first phase, the court found that the settlement was valid and enforceable. It found that both parties agreed to the settlement, that it was

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[2] The allegations of the cross-complaint were the same as those in a separate complaint that Wan and JWanCo had filed against Eytan a month earlier. (Super. Ct. S.F. City and County, 1994, No. 973008.) Wan dismissed that complaint on his own behalf and filed the cross-complaint in Eytan's action. Later, the trial court granted Eytan's motion for summary judgment against JWanCo in case No. 973008 and judgment was entered dismissing its complaint. The judgment dismissing JWanCo's complaint was later incorporated into a single final judgment in the two consolidated trial court actions. That portion of the final judgment disposing of action No. 973008 is not involved in these appeals.

supported by consideration, that its terms were sufficiently clear, and that it did not violate rule 3-400 of the Rules of Professional Conduct.[3]

Eytan argued that the court's ruling was dispositive of the case and that judgment should be entered in his favor, without any additional evidence. He argued that the settlement agreement was determinative of who owed what to whom and that the settlement was intended as an accord and satisfaction between the parties. The court rejected the argument that it should enter judgment on the settlement and permitted Wan to introduce evidence on his claims that the May guarantee was invalid and that Eytan had committed malpractice. After hearing the additional evidence, the court made several findings, which it later reiterated and expanded upon in a lengthy statement of decision. The court found, inter alia, that Eytan was representing Wan for purposes of determining the applicability of rule 3-300, but that none of the guarantees violated that rule. It also found that Eytan did not use duress, threaten to terminate his representation of Wan, BIT, or JWanCo, threaten to withhold an opinion letter, or employ other improper means to obtain the guarantees. It found that Wan's testimony on the matter of duress was not persuasive and that his various malpractice claims had no merit. The court concluded that Eytan was entitled to enforce the October settlement and was therefore entitled to judgment against Wan and JWanCo in the amount of $40,000.

Judgment was entered awarding Eytan damages in the amount of $40,000, plus prejudgment interest, and dismissing Wan's cross-complaint in that action. Wan has appealed from the judgment. (A089978)

Eytan moved for an award of attorney fees under Civil Code section 1717, subdivision (a). The court denied the motion, and Eytan has appealed from the order denying fees. (A091120) The two appeals have been consolidated for purposes of briefing, argument, and decision.

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[3] All subsequent references to rules are to the Rules of Professional Conduct.

APPEAL BY WAN FROM THE JUDGMENT - A089978

Wan contends that the award of damages must be reversed because the October settlement was executed without consideration and in violation of rule 3-400. He also argues that the court improperly awarded Eytan monetary damages on a cause of action for declaratory relief and violated his right to a jury trial.

A. The Personal Guarantees and Rule 3-300

We begin our analysis with Wan's argument that the settlement lacked consideration, which is based on his claim that he was not obligated to pay BIT's legal fees. That claim, in turn, is based on his argument that his personal guarantees to pay the corporation's fees were void because Eytan obtained those guarantees without informing him of his right to the advice of independent counsel, in violation of rule 3-300.

Rule 3-300 provides in relevant part: "A member shall not . . . knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client unless . . . . [¶] . . . [¶] (B) [t]he client is advised in writing that the client may seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice . . . ." Wan insists Eytan was obligated to inform him of his right to consult with another lawyer before executing the guarantees because they gave Eytan a "pecuniary interest adverse to a client" within the meaning of this rule.

"Rule 3-300 was intended to regulate two types of activity: business transactions between attorneys and clients and the acquisition by attorneys of pecuniary interests adverse to clients." (*Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal.4th 525, 545.) The "acquire [a] . . . pecuniary interest" provision is intended to encompass the pursuit of some business or financial interest as conventionally understood, such as the taking of an ownership interest in a client's property. (*Ibid*.)

Several Supreme Court cases provide guidance on the scope of the rule. In *Hawk v. State Bar* (1988) 45 Cal.3d 589, 601, the court held that an attorney who secured payment of fees by obtaining a note secured by a deed of trust on a client's property had acquired a pecuniary interest adverse to the client. The arrangement required compliance with former rule 5-101, a predecessor of rule 3-300, because it gave the attorney the

power of sale in a nonjudicial foreclosure proceeding. "[A]cquiring the ability to summarily *extinguish* the client's interest in property is what makes the acquisition 'adverse.' " (*Hawk, supra*, at p. 600, original italics.) The *Hawk* court contrasted fee arrangements enabling an attorney to collect disputed fees without judicial scrutiny with other arrangements not requiring compliance with the rule, such as an unsecured promissory note. The latter gives an attorney only a right to proceed against the client's assets in a contested judicial proceeding at which the client may dispute the indebtedness. "The note allows the attorney to obtain a judgment, and to seek to enforce the judgment against the client's assets, if any. It does not give the attorney a *present* interest in the client's property which the attorney can summarily realize." (*Id.* at pp. 600-601, original italics; see also *Brockway v. State Bar* (1991) 53 Cal.3d 51, 64-65 [fee arrangement giving attorney quitclaim deed to client's house gave him an ownership interest with a value greater than the agreed upon fees, with power to summarily extinguish client's equity]; *Hulland v. State Bar* (1972) 8 Cal.3d 440, 448-450 [disapproving practice of using a confession of judgment to collect fees because the practice presents opportunity for overreaching that avoids judicial scrutiny].)

Acquisition of an interest in a client's property may be adverse within the meaning of the rule under other circumstances as well. The Supreme Court has said that when an attorney has acquired an interest in a client's property where it is reasonably foreseeable that the acquisition may be detrimental to the client, the interest is adverse to the client. (*Ames v. State Bar* (1973) 8 Cal.3d 910, 920.) For example, an attorney who obtained an interest in a company indebted to his client, by which the attorney would profit from the company's success but was not personally liable on the debt, acquired an interest adverse to the client. In that situation, the attorney's personal financial interest was in conflict with the client's interest in obtaining full repayment of the loan. (*Kapelus v. State Bar* (1987) 44 Cal.3d 179, 193-194.) Another example is *Morgan v. State Bar* (1990) 51 Cal.3d 598, in which the court held that an attorney who obtained the right to use a client's credit card in exchange for payment of the balance acquired a pecuniary interest adverse to the client. When the attorney failed to make the payments as promised, he

gained a personal advantage at the client's expense. (*Id.* at p. 606.) The rule also applies when the client puts his or her assets in the hands of the attorney, such as when a client loans funds to the attorney in lieu of fees. (*Sugarman v. State Bar* (1990) 51 Cal.3d 609, 615-616; *Ritter v. State Bar* (1985) 40 Cal.3d 595, 602.)

In the present case, the trial court concluded that rule 3-300 did not apply to the Wan guarantees, and we agree with that conclusion. The guarantees did not put any of Wan's money or other assets in the hands of Eytan. They did not give Eytan an ownership or possessory interest in any of Wan's property, or anything equivalent or analogous to such an interest. They did not endow Eytan with any ability to summarily extinguish any asset or property interest of Wan, such as by nonjudicial foreclosure. As the trial court pointed out in its statement of decision, the only thing that Eytan obtained from Wan by virtue of the guarantees was a promise that Wan would pay if JWanCo did not. The guarantees were akin to the unsecured promissory note fee arrangement discussed in *Hawk v. State Bar, supra,* 45 Cal.3d at pp. 600-601, in that the guarantees only provided Eytan with the right to proceed against Wan in a contested judicial proceeding, at which Wan could dispute the indebtedness.

Wan has suggested no meaningful distinction for purposes of rule 3-300 between a fee agreement that includes an unsecured promissory note and the situation presented by his guarantee agreements with Eytan. The cases cited by Wan all involve facts significantly different from those at issue here, and they provide no support for his claim that the guarantees were within the scope of the rule. (See, e.g., *David Welch Co. v. Erskine & Tulley* (1988) 203 Cal.App.3d 884, 890-892 [law firm makes proposals to lure away the customers of its client, a collection agency]; *Maxwell v. Superior Court* (1982) 30 Cal.3d 606, 616-617 & fn. 6 [fee contract assigns counsel all rights to life story of client, a defendant charged with capital murder].)

B. <u>The October Settlement and rule 3-400</u>

Rule 3-400(B) provides in relevant part that a member shall not "[s]ettle a claim or potential claim for the member's liability to the client for the member's professional malpractice, unless the client is informed in writing that the client may seek the advice of

an independent lawyer of the client's choice regarding the settlement and is given a reasonable opportunity to seek that advice."

The October settlement included a provision for the parties to "exchange mutual releases of all claims known and unknown . . . ." on payment by Wan of $40,000 in full and final settlement of all claims between Eytan and JWanCo and Wan personally. Wan contends that the broad language of that release necessarily included potential malpractice claims and that as a result, the settlement violated rule 3-400 because Eytan did not advise him of his right to consult with another lawyer before agreeing to the settlement.

To determine the scope and meaning of the October settlement, we apply general principles of contract interpretation. (*General Motors Corp. v. Superior Court* (1993) 12 Cal.App.4th 435, 439.) The mutual intention of the parties at the time a contract was formed governs our interpretation. We infer that intent, if possible, from the provisions of the contract itself. (Civ. Code, §§ 1636, 1638, 1639; *Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Ins. Co.* (1993) 5 Cal.4th 854, 867.)

Nevertheless, if there is a dispute over the meaning of a contract, extrinsic evidence is admissible to show whether the contract is reasonably susceptible to a particular meaning. (*Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 39-40.) Evidence of the circumstances under which the parties entered into the contract may be relevant to explain its meaning. (Civ. Code, § 1647; Code Civ. Proc., § 1860; *Morey v. Vannucci* (1998) 64 Cal.App.4th 904, 912.) On appeal, when interpretation of a contract turns on the credibility of conflicting extrinsic evidence, this court will uphold any reasonable construction of the contract by the trial court as long as it is supported by substantial evidence. (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865-866 & fn. 2; *Morey v. Vannucci*, *supra*, at p. 913.)

Both Eytan and Wan testified about their understanding of the scope of the release. Eytan testified that the provision for mutual releases was nothing more complicated than "an ordinary accounting thing" relating to the bills he had sent, and that there had been no hint of a malpractice claim at that point. He said he did not advise Wan to seek

independent counsel regarding a potential malpractice claim because Wan had never raised or uttered such a claim. Eytan testified, "[A]ll I was trying to do is clear my bills." Wan testified somewhat vaguely that he thought he had "given up the right to sue [Eytan] or to make any kind of legal claim against him." Wan said he didn't know exactly what he was giving up, "maybe lawsuit or something." He also testified that he did not have a claim against Eytan at that date. At the time he wasn't thinking about claiming anything, but several days later, after he consulted with another lawyer, he began to think that Eytan hadn't handled the Cheyenne transaction correctly. All that evidence provides ample support for the trial court's finding that as of the date of the settlement, neither Eytan nor Wan had any malpractice claim in mind and that therefore the settlement was executed without any intention to release malpractice claims. Given the limited scope of the settlement, rule 3-400 did not apply.

We have already discussed and rejected Wan's claim that the settlement lacked consideration because the guarantees that preceded the settlement were void. Wan also makes a confusing argument that there was no consideration for the settlement because it did not completely release him from a debt but instead reduced the amount of a purported debt and created a new obligation. The argument ignores the elementary principle that an agreement to settle a bona fide disagreement or disputed claim is supported by sufficient consideration. (*Union Bank v. Ross* (1976) 54 Cal.App.3d 290, 298-299; *Miller v. Johnston* (1969) 270 Cal.App.2d 289, 299; *Dominguez Estate Co. v. L. A. Turf Club* (1953) 119 Cal.App.2d 530, 541-542.) Because the settlement resolved a dispute over the amount of fees that Wan owed, it was supported by adequate consideration.

To summarize, the trial court correctly concluded that the October settlement was supported by consideration and did not violate rule 3-400 and that Eytan was entitled to damages for breach of that settlement.

C. The Award of Damages and the Waiver of a Jury Trial

Wan's remaining arguments merit little discussion. First, he argues that the court improperly awarded Eytan damages for breach of the settlement based on his second cause of action because that cause of action sought only declaratory relief. Wan argues

that given the nature of Eytan's pleading, another action would be required to actually recover the damages. The argument ignores the well-established rule that a variance between the allegation of a pleading and the proof at trial is not material unless it has "actually misled the adverse party to his [or her] prejudice in maintaining [the] action or defense upon the merits." (Code Civ. Proc., § 469; see *Thrifty-Tel, Inc. v. Bezenek* (1996) 46 Cal.App.4th 1559, 1572.) Wan has not even attempted to show prejudice from the variance about which he complains. Furthermore, there is no indication in Wan's brief that he raised this issue below, and it is also well-established that the failure to object in the trial court to a variance constitutes a waiver. (*Colbert v. Colbert* (1946) 28 Cal.2d 276, 281; *Frank Pisano & Associates v. Taggart* (1972) 29 Cal.App.3d 1, 16.)

At oral argument, Wan's counsel represented to this court that Wan raised this issue in the trial court in his objections to the proposed statement of decision and in post trial motions. However, Wan's counsel provided no citation to the record in support of this assertion, and the only documents pertaining to any post trial motions in the clerk's transcript are those concerning Eytan's motion for fees. The clerk's transcript does include a document titled "Objections to Proposed Statement of Decision by Jonathan Wan." Wan argued in that document that the proposed statement of decision was ambiguous and failed to answer critical controverted issues, but he did not object on the ground that an award of damages was improper because the complaint sought only declaratory relief.

Wan also argues that the award of damages violated his right to a trial by jury. He claims he waived his right to a jury only as to whether he could repudiate the October settlement, but not as to any contract defenses he might have been able to raise had the trial court limited its relief to that requested in the cause of action for declaratory relief. The record refutes the claim. At the beginning of the trial, the court stated, "Now, as I understand it, there [have] been two agreements that have been reached between counsel this morning. [¶] The first is, as I understand it, all parties are going to waive a jury *in this case*." (Italics added.) The court cautioned, "And you understand now that once you waive a jury, that's a final decision." Then, undoubtedly because it was Wan who had

initially requested a jury trial, the court specifically questioned his attorney, saying, "You have had a chance to talk to your client about that?" Wan's attorney replied, "Mr. Wan understands the finality of his jury waiver." There was nothing ambiguous or limited or conditional about the waiver, and Wan never sought to withdraw it at any time during the trial. The argument has absolutely no merit.

APPEAL BY EYTAN FROM THE ORDER DENYING FEES - A091120

The May guarantee included the following provision: "This agreement shall be governed by attorneys' fees and the prevailing party shall be entitled to attorneys' fees." The October settlement did not include a similar provision or contain any reference to fees. After the trial, Eytan moved for an award of fees under Civil Code section 1717, subdivision (a), based on the fee provision in the guarantee. The court denied the motion, and Eytan has appealed from that ruling. (A091120)

The general rule is that each litigant must bear his or her own attorney's fees, and a court may award fees only pursuant to an agreement of the parties or statutory authority. (*Bauguess v. Paine* (1978) 22 Cal.3d 626, 634.) Eytan sought fees based on Civil Code section 1717, subdivision (a), which provides in relevant part: "In any action *on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party*, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs." (Italics added.) "The primary purpose of section 1717 is to ensure mutuality of remedy for attorney fee claims under contractual attorney fee provisions." (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 610; accord *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1091.)

Despite his initial complaint, Eytan proceeded to trial solely to enforce the October settlement, not the May guarantee. The court awarded him damages for breach of contract based only on the settlement, with no objection from Eytan. At the hearing on the motion for fees, the court emphasized that Eytan had elected to proceed on the settlement agreement alone. Eytan acknowledged that he had opted to pursue only the

settlement to "shorten things." He also acknowledged that the settlement agreement "superseded" his cause of action on the guarantees and that he had hoped to resolve the entire matter expeditiously by obtaining judgment on the settlement.

Although the settlement had no fee provision, Eytan asserts that he is entitled to fees under Civil Code section 1717 because Wan attempted to invalidate the settlement by arguing that the underlying guarantees were invalid. Relying on *Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124 (*Reynolds*) and other similar cases, Eytan contends that because he was forced to litigate the validity of the guarantees, including the May guarantee that did contain a provision for fees, he was entitled to fees under Civil Code section 1717.

Eytan's reliance on *Reynolds, supra*, 25 Cal.3d 124 is misplaced. The question before the trial court in the present case was whether Eytan satisfied the first prerequisite for an award of fees under Civil Code section 1717, namely, an action or cross-action on a contract containing a fee provision. *Reynolds* is one of a number of cases holding that when a party prevails in such an action by establishing that the contract was invalid, inapplicable, unenforceable, or nonexistent, Civil Code section 1717 permits that party's recovery of fees if the opposing party would have been entitled to fees under the contract had that party prevailed. (*Reynolds*, *supra*, at pp. 128-129; see *Hsu v. Abbara* (1995) 9 Cal.4th 863, 870 and cases cited.) Such cases do not eliminate the essential requirement for an action or cross-action on a contract with a fee provision and do not support Eytan's quest for fees.

We recognize that under some circumstances, several contracts that relate to the same parties and are made as parts of substantially one transaction are considered together. (Civ. Code, § 1642.) Under some circumstances, when a transaction involves several documents, only one of which contains a fee provision, the documents may be construed as one contract and the fee provision will apply in an action to enforce another of the documents that does not include a similar provision. (Pearl, Cal. Attorney Fee Awards (Cont.Ed.Bar 2d ed. 2000) § 6.9, p. 140.) In *Niederer v. Ferreira* (1987) 189 Cal.App.3d 1485, for example, the court construed a guaranty contract and a related

promissory note with an attorney fee provision as a single contract and upheld an award of fees in an action on the guaranty contract, even though that document did not include a fee provision. (*Id.* at pp. 1505-1506.) Similarly, in *Neptune Society Corp. v. Longanecker* (1987) 194 Cal.App.3d 1233, the court upheld an award of fees to the prevailing party in an action for breach of a partnership agreement with a cross-complaint for rescission, because promissory notes that were "inherent parts of the agreement" included fee provisions. (*Id.* at pp. 1249-1250.)

Whether several documents are to be considered one contract under Civil Code section 1642 is ordinarily a question of fact for the trial court. (*Brookwood v. Bank of America* (1996) 45 Cal.App.4th 1667, 1675; *BMP Property Development v. Melvin* (1988) 198 Cal.App.3d 526, 531.) Wan argued in opposition to the motion for fees that the guarantees and the settlement were not part of the same contract. The trial court agreed. Explaining its ruling disallowing fees, the court said to Eytan, "I think it is a settlement agreement. I looked through it six different ways to see if I could. I'm sorry. You spent a terrific amount of time litigating this, but I just don't see how I can find a way to give you attorney fees on it. *I think that it's a separate settlement agreement. It does not have an attorney fee clause in it. That's it.*" (Italics added.)

The evidence supports the court's finding. Eytan's October 1994 settlement proposal to Wan, which Wan accepted, stated that Wan and/or his companies owed $61,205.44 as of September 16, over $16,094.25 of which was owed by Wan personally, not as a guarantor. Although "gravely reluctant," Eytan proposed, "I will accept payment of $40,000 as satisfaction in full of all sums owed to [the] Law Offices of Mattaniah Eytan, including sums incurred in defending the Hertan motion for sanctions against this office." The settlement also included a provision for the exchange of mutual releases and other terms relating to the timing of payment. The settlement not only substituted a new obligation for all of Wan's existing and remaining obligations under the guarantees; it also extinguished any debt owed by Wan for legal fees on his personal matters. We agree with the trial court's determination that the settlement was a separate agreement, not part

of one transaction that encompassed both the guarantees and the settlement. Because the settlement did not include a provision for fees, Civil Code section 1717 did not apply.

Eytan then argues that even if the litigation only involved the validity of the October settlement, he should still be entitled to recover his fees. He relies on *Lanyi v. Goldblum* (1986) 177 Cal.App.3d 181, 187, in which the court held that a party in an action on a contract who accepted an offer of compromise under Code of Civil Procedure section 998 was entitled to recover fees under Civil Code section 1717 as an item of costs after judgment when the compromise agreement was silent on costs and fees. *Lanyi* applies the rule that a stipulation to settle a lawsuit does not extend to matters incident to the stipulated judgment, such as attorney fees, unless an award of fees was expressly or by necessary implication excluded by the stipulation. (See *Folsom v. Butte County Assn. of Governments* (1982) 32 Cal.3d 668, 677-679.) That rule has no relevance to this case, which involves a dispute over fees in an action to enforce a settlement, not a stipulation for judgment that is ambiguous in scope regarding fees.

Eytan also relies on *International Billing Services, Inc. v. Emigh* (2000) 84 Cal.App.4th 1175 (*Emigh*) to argue that Wan should be estopped from objecting to an award of fees to Eytan because Wan himself requested attorney fees in his answer to Eytan's first amended cross-complaint, based on the guarantee agreements. The argument takes language from *Emigh* out of context and ignores the facts and the court's holding. The *Emigh* court held that when a party claims entitlement in a complaint to attorney fees based on a breach of contract containing a fee provision and then loses on the merits at trial, that party is judicially estopped from asserting that the contract does not provide for an award of fees. (*Id.* at pp. 1178-1179, 1186-1192.) Nothing similar happened here, and the case is of no help to *Eytan*.

To summarize, the trial court did not err when it denied Eytan's motion for fees based on Civil Code section 1717. Our conclusion makes it unnecessary to consider Eytan's arguments about the amount of fees he should have received.

DISPOSITION

The judgment and the order denying the motion for fees are affirmed.[4] Each party to bear his own costs on appeal.

_____
Swager, J.

We concur:

_____
Stein, Acting P.J.

_____
Marchiano, J.

[4] Eytan has filed a motion seeking sanctions against Wan and his attorney, on the ground that Wan's appeal from the judgment is frivolous. The motion is denied.